IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 479

WALSTEIN C. FINDLAY, JR., FINDLAY GALLERIES, INC., and W. C. F. GALLERIES, INC.,

Petitioners,

v.

DAVID B. FINDLAY, INC., FINDLAY ASSOCIATES, INC., and DAVID B. FINDLAY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents' answering brief is in error when it asserts (p. 8) that no reference to the federal questions is to be found in either the majority or minority opinions of the Court of Appeals.

1. The dissenting opinion of Judge Burke relied on the New York rule laid down "in *Meneely* v. *Meneely* (62 N. Y. 427, 431-432) more than 90 years ago—and * * * consistently followed ever since * * *." (A-9) This rule as repeated by Judge Burke, with whom the other two dissenters concurred, was:

> "A person cannot make a trade mark of his own name, and thus obtain a monopoly of it which will

debar all other persons of the same name from using their own names in their own business."

The majority of the Court of Appeals, by declining to follow the *Meneely* case, and its rule as reiterated by the dissenting opinion in the Court of Appeals, has held that a person *can* make a trade mark of his own name. The conflict with federal law is clear.

It is also clear that the decision of the Court of Appeals, which deprives Wally Findlay of the right to use his own name, without any proof of any fault or wrongdoing by him, deprives him of both liberty and property rights of value, in violation of the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The property right of a person in his own name, and that "he has the same right to its use and enjoyment as he has to that of any other species of property" were recognized in the very case the majority of the Court of Appeals purported to follow, *World's Dispensary Medical Ass'n* v. *Pierce*, 203 N. Y. 419, 424 (1911) (A-7, A-8), and in the decisions cited in the dissenting opinion (A-9). The New York law, as a result of the majority opinion of the Court of Appeals, now allows confiscation of at least part of a person's property right in his name without any showing of fault on his part and without any requirement of compensation. Such a rule patently conflicts with the United States Constitution.

2. Respondents in this Court concede the existence of a conflict among the Federal Courts of Appeals by labeling the position of the Ninth Circuit a "minority rule" (Br. p. 10). It is the fact of conflict, not the size of the majority, that justifies this Court's review.

3. Respondents cavil by denying the existence of interstate commerce (Br. p. 6). Petitioner Wally Findlay is obviously engaged in interstate commerce, since he has galleries in Chicago and Palm Beach (A-2) as well as New York, and the injunction below bars his use of his name, in connection with his New York gallery, in "newspaper and magazine advertisements" (C-2). It should also be obvious, even to those not connoisseurs of the arts, that foreign commerce is involved, since the source of French impressionist and post-impressionist paintings, in which both petitioners and respondents specialize (A-5), is France.

4. *Hilton* v. *Hilton*, 89 N. J. Eq. 182, 104 Atl. 375 (1918), remains a controlling authority, in spite of respondents' attempt to distinguish it (Br. p. 12). There is no showing here that Wally Findlay used his name so as to induce the public to believe that his business was the same as or a part of the business conducted by his brother. Furthermore, the Courts below did not attempt to regulate Wally Findlay's use of his name—they flatly barred it, even in the form "Wally Findlay" (C-2).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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